No. 11629

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ELY A. TODOROW and LEONARD A. POTOLSKI,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

Jurisdictional Statement.

Appellants were indicted under Section 80 of Title 18 of the United States Code on November 20, 1946 [R. 2-6]. The District Court had jurisdiction of the cause under Section 24 of the Judicial Code (28 U. S. C. 41(2)). The offenses charged were committed in Los Angeles and Port Hueneme, within the Central Divsion of the Southern District of California [R. 145, 155, 183].[1] Judgment was entered on Count Four of the Indictment, the only count involved in this appeal, on May 9, 1947 [R. 41-44]. Notice of appeal was filed on May 9, 1947 [R. 45]. This Court has jurisdiction under Section 128 of the Judicial Code (28 U. S. C. 225).

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[1]References preceded by the letter "R" are to the printed record on appeal and those preceded by "A.B." are to Appellant's Opening Brief.

Statutes Involved.

Count Four of the Indictment charges a violation of Section 80 of Title 18 of the United States Code, which provides in part as follows:

> "* * * whoever shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations * * * knowing the same to contain any fraudulent or fictitious statement or entry in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder, shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

Statement of the Case.

On November 20, 1946, the Federal Grand Jury at Los Angeles returned an Indictment in Four Counts, which was filed that day in the United States District Court for the Southern District of California, Central Division, charging appellants with causing false statements to have been made to the War Assets Administration in connection with the sale of war surplus property, in violation of Section 80 of Title 18 of the United States Code [R. 2-6]. Only Count Four is involved in this appeal, appellants having been acquitted on the other three counts. Count Four charges that appellants caused Byron N. Taylor to state in a Veteran's Application for Surplus Property, and a Purchase-Requisition Form, used in con-

nection with the purchase of six tank refueler trucks, that he was going to start an oil transporting business as an individual proprietorship under his own name and was purchasing the six trucks for his own personal use in such business and not for resale, whereas in truth he was purchasing the vehicles for the sole benefit of defendants with funds advanced by them.

Appellant Todorow pleaded not guilty to all counts on April 22, 1947 [R. 9, 63-64], and appellant Potolski pleaded not guilty to all counts on April 24, 1947 [R. 11]. Motions to dismiss the Indictment were made on April 22, and April 24, 1947, and were denied [R. 9-11, 57-63, 69-72]. A request for bill of particulars was filed and denied on April 24, 1947 [R. 11, 72].

Trial was commenced on April 24, 1947. On May 1, 1947, the jury found each of the defendants not guilty on the first three counts and guilty on Count Four [R. 35]. Motions for a new trial, in arrest of judgment, and for judgment notwithstanding the verdict, were filed on May 3, 1947 [R. 36-39], and were argued and denied on May 9, 1947 [R. 39-40].

On May 9, 1947, each defendant was sentenced on Count Four to imprisonment for two years and fined $3,000, to be committed until the fine be paid [R. 41-44].

The Facts.

Appellant Potolski was an automobile dealer from Albany, New York [R. 214, 217]; and appellant Todorow, an export representative from New York City [R. 320]. They heard through advertising of a sale by the War Assets Administration of surplus trucks at Port Hueneme, California [R. 217, 266], and came out to California together [R. 218, 266-267, 322]. Both appellants were veterans of World War II [R. 215, 265].

The particular sale of surplus trucks here involved lasted from May 20, 1946 until August 23, 1946 [R. 110, 115]. Twenty-five units were the maximum number that could be sold to any one purchaser during the course of the sale relevant here [R. 115, 125]. Rules as to eligibility to buy were changed from time to time, but on July 11, 1946, the date involved in Count Four, the truck sale was open to so-called priority holders, *i. e.,* veterans, federal government agencies, states, counties, municipalities, etc., and to any licensed automobile dealers, whether or not such dealers were veterans, all on a first-come-first-served basis [R. 114-115, 124].

The procedure followed as to a veteran purchaser was as follows: He would fill out at Port Hueneme a form of "Veteran's Application for Surplus Property" [*cf.* Gov. Ex. 1; R. 367-8], describing the articles he wished to buy. The certification officer of the War Assets Administration at Port Hueneme, on presentation by the

veteran of the signed application and his discharge papers, would certify the application for a veteran's preference, and the veteran could buy the specified articles [R. 145-146, 153-154].

Appellants filled out applications at Port Hueneme on June 26, 1946, as veterans, and were certified for, bought, paid for, and received 25 2½ ton dump trucks each, thus exhausting their quotas [R. 146-150, 152-154, 218-220, 267-268, 298, 126-7; Gov. Ex. 1, 1A, 2; R. 367-374].

Appellants knew of the 25 unit per purchaser limit, having been told of it by Curtis Alexander, the manager of the automotive equipment sales at Port Hueneme, both in a telephone conversation before they came to California [R. 217, 266] and face to face after they arrived at Port Hueneme [R. 119]. After appellants had purchased their fifty trucks, they asked Alexander if they could buy more, and were again told that the limit was twenty-five units per person [R. 120, 122]. Appellants in their own testimony showed that they knew of this limitation [R. 217, 282].

Byron N. Taylor, the veteran involved in Count Four, was an elevator operator at the Alexandria Hotel in Los Angeles, where appellants were staying during the sale [R. 185, 226]. On about July 10, 1946, after appellants had bought their limit of fifty trucks, appellant Todorow approached Taylor and asked him if he was a veteran of World War II and would like to make $20.00 [R. 175]. When Taylor asked how, Todorow told him that all Taylor would have to do was to come to Oxnard with him the following day and buy some trucks

for him [R. 176]. On the next day, July 11, 1946, appellants Todorow and Potolski, and Taylor, and Gordon W. Lauridsen, a parking attendant at the Hotel Alexandria [R. 191], drove from Los Angeles to Port Hueneme [R. 176-183, 227, 288]. During the trip, when questioned about the legality of the proposed transaction, Potolski stated that appellants had bought their limit of twenty-five trucks apiece, and were using other veterans' priorities [R. 177]. Taylor and Lauridsen were told they were to buy six 800-gallon refueler trucks each [R. 178, 183].

On arrival at Port Hueneme, the four went to the certification shack, where Taylor and Lauridsen filled out applications for six refueler trucks each and were certified as veterans for such trucks [R. 183, 155-158; Gov. Ex. 6, R. 376-377]. Taylor filled out the application, indicating that he was going into the business of "transporting oil" as "soon as possible" under the trade name of "Byron N. Taylor" as an "individual proprietorship" [Gov. Ex. 6; Rr. 376, 183]. He signed a certification on the application that he was "not procuring the property listed in this application for the purpose of resale; and that said property is to be used in and as part of the enterprise described herein" [Gov. Ex. 6; R. 377]. He also signed a certification on a Purchase-Requisition Form that the "vehicles I wish to purchase are for my own personal use or for the maintenance of my established business, profession or agricultural activity" [Gov. Ex. 6; R. 379, 380]. When Taylor, in filling out the application, came to the portion of the application relating to the business, he asked appellant Todorow what business he ought to put down. Todorow said "that there was no question as

to what business I was going in and that anything would be sufficient" [R. 184]. Taylor then filled out the application as stated above, though he had no intention of going into the oil transporting business [R. 185].

After the application was certified, Taylor was given a Purchase-Requisition Form [Gov. Ex. 6, R. 380]. Todorow looked it over and noted that it called for only one truck [R. 188]. He sent Taylor back to get it changed, and, when Taylor was unsuccessful, went back with Taylor and succeeded in obtaining a second purchase-requisition form for 5 additional trucks [R. 189; Gov. Ex. 6, R. 379]. Contracts for the sale of the six trucks to Taylor were made out, and were turned over to Todorow in Potolski's presence at Port Hueneme [R. 193]. On the way back, in Oxnard, Taylor was paid his $20.00 and signed a receipt on the back of a Western Union blank [R. 194, 230]. Lauridsen was paid $15, but refused to sign a receipt [R. 194-195, 230]. On the trip back, when Lauridsen asked why the hush-hush at Port Hueneme if everything was so legal and on the up and up, Potolski replied, "We didn't want it to look like you were buying them for us" [R. 196-197]. Potolski further stated that if anything was wrong, Taylor and Lauridsen would get it in the neck, not appellants, and that anyhow the deal was petty larcency of which nothing great would come [R. 198].

Subsequently, agents of War Assets interrogated Todorow and Potolski about their purchase of trucks through Taylor and other veterans [R. 232-233, 291-292]. As a result of the call, appellants destroyed some papers, including the contracts in connection with the Taylor purchase, and did not pay for or receive the trucks [R. 293].

ARGUMENT.

I.

The Evidence Was Sufficient to Support the Verdicts.

Appellants contend that the evidence was insufficient to support the verdicts, and that they were contrary to law and the evidence, on three main grounds: (1) that there was no false statement in a matter within the jurisdiction of a government agency, because no rule, regulation, or order governing the sale was proved, or was proved to be violated; (2) that no preference to veterans existed on July 11, 1946, and the government's case depends on such preference, and (3) that appellants did not cause the Taylor false statements to be made.

(1) Matter Within the Jurisdiction of War Assets Administration.

There is no doubt that the statements charged in the indictment to have been made by Byron N. Taylor were false, *i. e.,* "that he would immediately start an oil transporting business as an individual proprietorship under the trade name of 'Byron N. Taylor,' and that he was purchasing said vehicles for his own personal use or for the maintenance of said oil transporting business and not for the purpose of resale." Taylor himself said that he did not intend to buy the trucks for his own personal use, that he was an elevator operator, and he had no intention of going into the oil transporting business [R. 184-5]. However, appellants question whether these false statements were in a matter within the jurisdiction of a government agency.

Ths Surplus Property Act of 1944 (58 Stat. 765, 50 U. S. C., App., Secs. 1611-1646) was passed to facilitate

and regulate the orderly disposal of surplus property. By Executive Order 9689 (11 F. R. 1265), effective January 31, 1946, the President created the War Assets Administration and transferred to it the surplus property disposal powers previously vested in other agencies. Congress thereafter recognized the War Assets Administration in the Act of May 3, 1946 (60 Stat. 168) amending the Surplus Property Act of 1944. This amending act read in part:

> "The Administrator shall prescribe regulations to effectuate the objectives of this Act to aid veterans in the acquisition of surplus property, in appropriate quantities and types, to enable them to establish and maintain their own small business, professional, or agriculatural enterprises." (60 Stat. 168.)

The amendment further required that the Administrator prescribe a reasonable time, but not less than 15 days, during which certain property should be for exclusive disposal to veterans.

War Assets Administration Regulation 2 (11 F. R. 5125), issued May 10, 1946, effective May 3, 1946, set up a scheme for disposing of surplus personal property to priority claimants, with particular preference to veterans. Section 8302.9(b) provided that, except in disposals of property to veterans to be resold in the regular course of their business, transfers to priority claimants should be "for their own use only and not for transfer or disposition by them to others, and disposal agencies may require priority claimants so to certify" (11 F. R. 5127). Sections 8302.4, 8302.5 and 8302.6 (11 F. R. 5126) set up the order of priorities and the mechanics of setting aside property to meet them. Section 8203.6(b)

provided that property in excess of that needed to care for the needs of priority claimants could be disposed of promptly to others. Section 8302.8(a) provided (11 F. R. 5126):

> "A veteran desiring to acquire property set aside under §8302.4 or to exercise his priority under §8302.5 shall apply to any certifying office of War Assets Administration and shall furnish the Administration with complete information regarding the property desired. War Assets Administration will satisfy itself through reference to the applicant's discharge papers or to other satisfactory evidence that the applicant is a veteran and that the property applied for is for his own personal use or to enable him to establish or maintain his own small business, professional, or agricultural enterprise and shall require of the applicant a supporting statement or affidavit. War Assets Administration will issue an appropriate certificate to such veteran stating that he is a veteran entitled to purchase the types and quantities of the property described therein."

A comparison of the requirements of these duly promulgated regulations, and particularly Section 8302.8(a), with the documents specified in the indictment—"Veteran's Application for Surplus Property" [Gov. Ex. 6; R. 376-377] and "Purchase—Requisition Form" [Gov. Ex. 6; R. 379-380]—shows that the information called for in the forms was that required by the regulations. The pertinent items in the forms are those relating to the intended use of the surplus property, which are items 4 through 7 of the Application [R. 376], and the certifications that appear on both the Application (Item 18) and the Purchase Requisition Form [R. 377, 379, 380].

The courts have found information furnished the government in analogous circumstances to be in a "matter within the jurisdiction" of the agency involved. *Fuller v. U. S.,* 110 F. (2d) 815, 817 (C. C. A. 9, 1940), cert. den. 311 U. S. 669; *United States v. Zavala,* 139 F. (2d) 830, 832 (C. C. A. 2, 1944); *Sanchez v. United States,* 134 F. (2d) 279, 283 (C. C. A. 1, 1943), cert. den. 319 U. S. 768; *United States v. Barra,* 149 F. (2d) 489, 490 (C. C. A. 2, 1945).

One case has gone even further, and has found oral statements to a government official charged generally with enforcing a law are within this phrase, without any specific regulation requiring such information. *Marzani v. United States,* 168 F. (2d) 133, 141-2 (Ct. of Ap., Dist. of Col. 1948), cert. granted 6/21/48, 333 U. S., Preliminary Print, No. 4, p. IX. In the *Marzani* case, statements by a federal employee to a superior at an informal conference to review the charges against the employee, which had led to an official request for his resignation, were held within the statute.

The facts are that the War Assets Administration did have jurisdiction of surplus property disposals, and the false statements were made on the forms used to initiate and perfect sales to veterans and covered facts essential to the sale. Even if this Court should feel that the chain of governmental authorization for requiring the statements shown in the Application and the Purchase-Requisition Form was not completely established, it is settled that where a defendant makes a false statement as to information asked of him by the government, he cannot raise as a defense in the criminal proceeding the authority of the particular agency so to act on constitutional or

similar grounds, so long as color of authority exists in the agency. *Kay v. United States,* 303 U. S. 1, 6-7 (1938); *United States v. Kapp,* 302 U. S. 214, 217-218 (1937); *Hills v. United States,* 97 F. (2d) 710, 713 (C. C. A. 9, 1938); *United States v. Meyer,* 140 F. (2d) 652, 655 (C. C. A. 2, 1944); *United States v. Barra,* 149 F. (2d) 489, 490 (C. C. A. 2, 1945); *United States v. Rubinstein,* 166 F. (2d) 249, 254 (C. C. A. 2, 1948), cert. den. 333 U. S. 868. It thus appears that there were regulations requiring the information here requested, and that this information was in a matter within the jurisdiction of War Assets Administration.

(2) Veteran's Preference.

Appellants further contend that the Government's case is founded on the existence of a veteran's preference on July 11, 1946, which was not proven (A. B. 9). Appellants misconceive the Government's case. That case is based on a false statement in a matter within the jurisdiction of a Government agency. It is clear that a false statement was made to a Government agency. Appellants by this objection are raising again, in slightly different form, the question of whether the statement was in a matter within the jurisdiction of the War Assets Administration.

Testimony as to the rules governing the particular sale here involved was given by Curtis Alexander, the manager of automotive and construction equipment sales at Port Hueneme for War Assets Administration, who was in charge of the particular sale here involved [R. 108]. The sale lasted from May 20, 1946 [R. 108] until August 23, 1946 [R. 125]. Any person eligible to buy at the

sale was limited to a total of 25 units over the entire period of the sale relevant here [R. 113, 115-116, 125].[2] From May 20, 1946 until June 24, 1946 the sale was open only to veterans [R. 112-113]. From June 24 until July 2, it was open to veterans and to other priority groups, such as federal agencies, state agencies, etc., the veterans being able to buy each day, but each other priority group having a separate day in rotation [R. 113-114]. On July 2, 1946, the sale was thrown open to all priority groups and to any licensed automobile dealer, all on a first-come-first-serve basis [R. 114]. Not only did Alexander testify that he told appellants of the 25 unit limitation [R. 119, 120, 122], but appellants in their testimony admitted they knew of it [R. 217, 266, 282]. Taylor, the veteran involved in Count Four, as appellants knew, was not a dealer [R. 185, 226], so he could qualify at the sale only as a veteran, as appellants intended he should [R. 175]. The Government's case does not turn on the fact that veterans had a preference, but on the fact that appellants caused false statements to be made in a matter within the jurisdiction of a Government agency. Appellants, having exhausted their quota, were not eligible to buy, so they made use of someone else—Taylor—who was in one of the classes eligible to buy, and caused him to make false statements in the buying.

It is true that evidence as to eligibility to buy at this sale was by the oral testimony of Alexander, but it was

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[2]From May 20 to May 27 a purchaser was limited to one unit [R. 112]. From May 27 to June 10 he could buy only one of each of the items for sale, but apparently as many different items as he chose [R. 112-113]. The 25 unit limit—either 25 different items, or 25 of the same item—began June 10 and ran to the end of the sale [R. 113].

without objection that it was not the best evidence [R. 110-116].[3] And appellants also cross-examined Alexander on this testimony [R. 123-125].

Appellant was eminently qualified to give this testimony. He was employed by the War Assets Administration as the manager of automotive and construction equipment sales at Port Hueneme, and it was part of his duties to conduct sales of such surplus property. He was in charge of the particular sale here involved [R. 108].

Assuming that the court would have excluded this evidence had timely objection been made, it is settled that the objection is waived on failure to make it at the trial, and the evidence can be given its natural probative effect. *Diaz v. United States,* 223 U. S. 442, 450 (1912); *Rowland v. St. Louis and Santa Fe Railroad Co.,* 244 U. S. 106, 108 (1917); *Opp Cotton Mills, Inc. v. Administrator,* 312 U. S. 126, 155 (1941); *Becher v. United States,* 5 F. (2d) 45, 51 (C. C. A. 2, 1924), cert. den. 267 U. S. 602; *Burgess v. King,* 130 F. (2d) 761, 763 (C. C. A. 8, 1942). In the *Becher* case, copies made by a United States storekeeper of inspectors' records were admitted without objection. The court pointed out that they were only secondary evidence, the inspectors' records not having been produced, but found no error.

Appellant further contends (A. B. 11) that there was no evidence or instructions by which the jury would know that there was any rule, regulation, or directive requiring

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[3]At the outset of Alexander's testimony there was an objection to a question relating to changes in orders concerning eligibility to purchase, on the grounds, among others, that it was not the best evidence [R. 110-111]. The Government withdrew the question [R. 111], and that particular objection to this line of questioning was not renewed.

the statements made by Taylor. The applicable regulations have been previously discussed. And the jury was instructed "that statements and representations in 'Veterans' Applications for Surplus Property' and 'Purchase-Requisition Forms' are matters within the jurisdiction of an agency of the United States, within the meaning of that statute" [R. 336]. These were questions of law, which were properly decided by the court.

Appellant also makes much of the point that dealers who bought at the sale could resell to anyone (A. B. 12). However, as previously pointed out, Taylor, the veteran in Count Four, was not a dealer [R. 185, 226] and hence had to and did certify that he was buying for his own use. The testimony as to what dealers could do is irrelevant.

(3) Causing Statements to Be Made.

Appellants also contend that there is no evidence appellants caused Taylor to make the false statements (A. B. 12-14). A review of all the evidence will indicate ample proof from which the jury could and did find appellants had caused the false statements to be made. This Court, of course, does not weigh the evidence or determine the credibility of witnesses, and the finding of the jury must be sustained if there is substantial evidence, taking the view most favorable to the Government to, support it. *Glasser v. United States*, 315 U. S. 60, 80 (1942).

Taylor testified that appellant Todorow approached him in Los Angeles, and told him he could make $20.00 if he would buy some trucks for him [R. 175-176]. He was told to buy six two-and-one-half ton 800-gallon refueler trucks [R. 178, 179, 183]. Appellants drove him from Los Angeles to Port Hueneme, along with another vet-

eran engaged in a similar transaction [R. 176-183]. On the way up appellant Potolski stated that he and Todorow had bought their limit of 25 trucks each, and were using other veterans' priorities [R. 177]. Appellants told Taylor and the other veteran they were to buy six trucks apiece [R. 183] and went into the certification shack with them [R. 183]. When questioned about filling out the application, Taylor testified as follows [R. 184]:

> "Q. Directing your attention to the words under 'Description of enterprise'—'transporting oil,' is that your handwriting? A. Yes; it is, sir.
>
> Q. Did you have any conversation with either of the defendants prior to making out that word, writing those words 'transporting oil'? A. Upon coming to that point in the application, intending not to buy the trucks for my personal business, I did not know what to put down under that question. I then referred to Mr. Todorow.
>
> The Court: How do you mean you referred to him?
>
> The Witness: Well, your Honor, he was present in the certification shack.
>
> The Court: Did you say something to him?
>
> The Witness: I walked over to him and I asked him.
>
> The Court: What did you say?
>
> The Witness: I asked him as to what business I ought [417] to put down.
>
> The Court: And what did he say?
>
> The Witness: He said that there was no question as to what business I was going in and that anything would be sufficient."

Taylor was not in the oil transporting business, and had no intention of going into that business [R. 185]. Taylor then obtained the Purchase-Requisition Forms [Gov. Ex. 6, R. 379-380], on which the particular trucks were noted by number. Taylor never examined any of the trucks to pick out what he wanted [R. 187]. When, through some error, he was given a Purchase-Requisition Form for only one truck, it was appellant Todorow who straightened it out for him and got another requisition for five trucks [R. 188-189]. Taylor then got the contracts for the trucks, and turned them over there at Port Hueneme to Todorow [R. 192-193]. Taylor was paid his $20.00, and was made to sign a receipt by Potolski [R. 194]. The legality of the transaction was discussed on the way back, and Potolski said, "We didn't want it to look like you were buying them for us" [R. 196].

Appellants confirm by their testimony the main outlines of this story. Todorow admitted talking to Taylor about oil trucks prior to the trip to Port Hueneme, and even conceded that he told Taylor he would buy trucks from him [R. 286]. Appellant Potolski also admitted he told the veterans that appellants wanted oil trucks, and that he told Taylor he would buy from Taylor [R. 251, 252-253]. Appellants admit the trip to Port Hueneme with Taylor [R. 227, 288], the payment of $20.00 to Taylor [R. 228, 247]. And appellants admit they obtained from Taylor his contracts for the six trucks [R. 255, 312]. Appellants further stated that $25.00 was the going price for buying trucks from dealers [R. 256, 294]. In addition, appellants were familiar with the procedure and forms,

having bought 25 trucks each themselves under certification as veterans.

Evidence of a similar transaction on the same trip between appellants and Lauridsen, another veteran, was admitted as bearing on appellants' intent [R. 158, 185-186, 192-193].

From this recital, it is apparent that substantial evidence was offered from which the jury could find appellants caused the statements to have been made.

Appellants also suggest that the rule in perjury cases requiring two witnesses to a transaction should apply (A. B. 14-16). However, there is no analogy here, for there is no dispute in the evidence as to the falsity of the statements, and that they were made. The only dispute is if appellants caused them to be made. On that, the testimony of Taylor, plus the corroborating circumstances outlined above, are sufficient to sustain the verdict. Even if Taylor be viewed as an accomplice, it is well-settled that in the Federal Courts a defendant can be convicted on the uncorroborated testimony of an accomplice. See, *e. g., Caminetti v. United States,* 242 U. S. 470, 495 (1917); *Westenrider v. United States,* 134 F. (2d) 772, 774 (C. C. A. 9, 1943); *United States v. Wilson,* 154 F. (2d) 802, 805 (C. C. A. 2, 1946, judgment vacated and remanded for resentence 328 U. S. 823); *Kempe v. United States,* 151 F. (2d) 680, 686 (C. C. A. 8, 1945); *Robertson v. United States,* 111 F. (2d) 1018 (C. C. A. 6, 1940).

II.

The Jury Was Properly Instructed.

Appellants attack the giving of two instructions (A. B. 18-22) and the failure to give three instructions requested by appellants (A. B. 22-24). The court's rulings on these instructions were proper.

(1) Proof of Falsity of All Representations.

Appellants object to the instruction of the Court [R. 338-339] to the effect that the Government need not prove that the statements charged in the indictment were false in all the particulars charged, but only that one or more of such representations was false. The charge as given by the Court correctly stated the law. When several false statements are pleaded in the conjunctive, it is not necessary for the Government to prove all of them.

This is so in the case of perjury. *Shallas v. United States,* 37 F. (2d) 692, 694 (C. C. A. 9, 1929); *United States v. Otto,* 54 F. (2d) 277, 279-280 (C. C. A. 2, 1931); *United States v. Mascuch,* 111 F. (2d) 602, 603 (C. C. A. 2, 1940), cert. den. 311 U. S. 650. In the *Shallas* case, where it was charged that defendant had testified falsely that he had seen an individual at a hotel in the morning and again twice in the afternoon, this Court said it was sufficient if the Government proved only that it was false as to the afternoon. And in *Warszower v. United States,* 312 U. S. 342, 345 (1941), the Court sustained a conviction for use of a passport secured through false statements where the Court below had charged the jury they could convict if any one of the statements charged in the indictment was found false.

Similarly, in mail fraud prosecutions, it is well settled in this circuit that all the Government need prove is that

one or more material misrepresentations charged in the indictment are false, and the balance of the representations alleged need not be proven. *Lewis v. United States,* 38 F. (2d) 406, 410 (C. C. A. 9, 1930); *Levine v. United States,* 79 F. (2d) 364, 369-370 (C. C. A. 9, 1935); *Ballard v. United States,* 138 F. (2d) 540, 545 (C. C. A. 1943), reversed on other grounds, 322 U. S. 78. In cases of conspiracy, it is not necessary to prove but one of the various overt acts alleged in support of the conspiracy. *De Lacey v. United States,* 249 Fed. 625, 628 (C. C. A. 9, 1918); *Fredericks v. United States,* 292 Fed. 856, 857 (C. C. A. 9, 1923).

The cases cited by defendant (A. B. 18), even if viewed in their strongest light, do not affect the charge here. Taking the *Cramer* case as an example (A. B. 18; 325 U. S. 1, 36, footnote 45), a footnote suggests that in treason, if several overt acts are submitted to the jury and a general verdict of guilty is found, and if any one of the overt acts submitted is not supported by evidence, the conviction must be reversed. Assuming that such is the law, there is sufficient evidence of the falsity of each of the statements alleged in Count Four of the indictment in this case.

The false statements alleged are [R. 6]:

> "In said application and form, Byron N. Taylor stated and represented that he would immediately start an oil transporting business as an individual proprietorship under the trade name of 'Byron N. Taylor,' and that he was purchasing said vehicles for his own personal use or for the maintenance of said oil transporting business and not for the purpose of resale. Said statements and representations, as the defendants then and there well knew, were false and fraudulent in that Byron N. Taylor had no intention

of starting said oil transporting business or any other such business and was not purchasing said vehicles for his own personal use or for the maintenance of any business in which he had or intended to have an interest but, in truth and in fact, was purchasing said vehicles for the sole benefit and account of the defendants with funds advanced by them."

Proof of falsity was established by Taylor's testimony that he had no intention of going into the oil transporting business, and that he was an elevator operator [R. 185]. He was asked by appellants to buy the trucks for them [R. 176, 183] and he turned the contracts to buy the six trucks issued by War Assets over to appellants for $20.00 [R. 193]. Appellants admitted they obtained the purchase papers [R. 255, 312], but did not go through with the deal and pay the money because of the call made on them by Government agents [R. 255].[4]

(2) Flirting With the Jury.

Counsel objects to the italicized portion of the following charge [R. 339]:

> "You should distinguish carefully between what has been testified to by the witnesses and what has been stated by the attorneys. *Statements and arguments of counsel, and stage-play and acting and flirting with the jury by counsel are not evidence in the case.* Anything that counsel say or do will not constitute evidence in the case and has no bearing upon the evidence in the case."

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[4]Under the sales procedure, a veteran was allowed a period of 10 days after he received a contract from War Assets Administration in which to pay for the goods allotted him [R. 120]. Appellant Todorow testified that because of the mode of payment for articles —by bank check—there was no way of telling who was making the payment [R. 300].

Appellants contend this was prejudicial to defense counsel, and that the Court wrongly gave this portion of the charge without previously having shown it to counsel (A. B. 19-22, 48-49).

Appellant makes no contention that the charge is not an accurate statement of the law, and it is difficult to understand how a fair statement of law in a charge can be prejudicial. The charge does not single out defense counsel, but applies equally to all counsel. It is conceivable that it would hurt defense counsel if he, and he alone, had engaged in "stage-play and acting and flirting with the jury," but the Court would be derelict in its duty if it should condone such conduct by ignoring it. If, as defendant contends (A. B. 20-21), there was no such conduct on his part, his is not prejudiced thereby.

This instruction, a correct statement of the law, singling out neither counsel, is quite different from instructing the jury that the defendant lied on the stand (*Quercia v. United States,* 289 U. S. 466, 468; A. B. 48-49) or that they must find defendant guilty unless they found some one else committed the theft (*Bihn v. United States,* 328 U. S. 633, 637; A. B. 48). Such was the situation in the cases from which appellants quote (A. B. 48-49).

The excerpt from the record in which the Court described counsel's conduct [R. 347, A. B. 49] occurred out of the presence of the jury [R. 344], and hence could not prejudice appellants.

As to appellants' objection that the modified instruction was not previously submitted to counsel, Rule 30 of the Rules of Criminal Procedure is pertinent. Under that rule, the Court must inform counsel of its proposed action on requests for instructions prior to arguments. However, there is no requirement in the rule that the Court furnish counsel in advance with copies of charges that the

Court proposes to give as its own charges. In the present case, counsel was furnished with a copy of the Court's proposed charges, including a charge to disregard statements of counsel, but the charge was amplified thereafter by the Court to include "stage-play and acting and flirting with the jury." Since the Court already had done more than the rule obliged it to, there was no violation of the rule. And counsel knew before argument that there would be a charge that statements of counsel were not evidence, so that counsel could have commented upon it in his argument, had he wanted to do so. This is not a point of law which would cause counsel to make any basic change in his argument in any event. As the Court said in *Steinberg v. U. S.*, 162 F. (2d) 120, 125 (C. C. A. 5, 1947), cert. den. 322 U. S. 808, where the failure of the Court to indicate its rulings on requests to charge in advance of argument is an error of an inconsequential sort, a conviction will not be set aside. Such is certainly the case here.

(3) Defendants' Instruction 19 [R. 28].

Defendants' 19, which the court rightly refused to give, dealt with innocent intermediaries and proximate cause. The court gave lengthy instructions on "cause" as used in the indictment [R. 337-338]. And, as a matter of fact, although the court's charge does not use the words "proximate cause," it gives a detailed definition of them [R. 337]. Further, the court instructed the jury to acquit appellants "if you find that the defendants did not knowingly and wilfully cause any false statements to be made" [R. 340].

In connection with this instruction, counsel also raises the question of the testimony of accomplices (A. B. 23). The court cautioned the jury at length on accomplice tes-

timony [R. 334-335], and appellants make no attack upon this charge.

(4) Defendants' Instruction 16 [R. 27].

The court also refused to give Defendants' 16, an alibi instruction. The present case does not involve the usual alibi situation, where defendants' presence at the scene of the crime is essential. As the jury was here charged, because of Section 550 of Title 18, it was not necessary to show that each defendant committed each and every step necessary to competition of the offense [R. 340]. There was some evidence Potolski was not in the certification shack when Taylor made out the form, but there was evidence that he was [R. 185], and there was evidence he and Todorow were working together [R. 322]; and had driven Taylor to Port Hueneme together, discussing their joint purpose on the way. On that trip, Potolski stated that, because he and Todorow had exhausted their quota, they were using veterans' priorities [R. 177]. Potolski made the $20 payment to Taylor after they left Port Hueneme [R. 228]. The mere fact Potolski may not have been in the shack at the moment one step in the transaction occurred did not give him an alibi in the usual sense of the word, so the alibi instruction was not called for. Counsel in argument could call attention to testimony as to his absence.

(5) Defendants' Instruction 5 [R. 22].

Defendants' 5 instructs the jury that conduct of parties subsequent to the offense was relevant. Since the evidence was admitted, the jury could rightly consider it, and counsel could argue concerning it. There was no need to single such testimony out in an instruction, and the instruction was rightly refused.

III.

The Indictment Is Sufficient.

Appellants attack the sufficiency of the Indictment for failure to allege a great variety of matters, most of which are evidentiary (A. B. 25). The Indictment in the case is clearly sufficient. It contains all the requisite statutory language, identifies the exact papers in which the false representations were made, specifies in exact language the false representations and tells in what respect they were false, identifies the veteran involved, and gives the date.

Considering the objections as they are raised (A. B. 25), the indictment does state that the property was the property of the United States [R. 5-6]. It states further that the matter of authorizing and approving the sale was a matter within the jurisdiction of the War Assets Administration, which satisfies the statutory requirement of the crime, and could be said to satisfy even appellants' requirement that the indictment charge that the sale was being "conducted" by War Assets Administration. The details set forth in the second paragraph of page 25 of appellants' brief, if relevant, all go to matters of proof.

In *Chevillard v. United States,* 155 F. (2d) 929, 932 (C. C. A. 9, 1946), this court sustained an indictment under Section 80 where a similar series of points was raised. This Court also held that the words "in a matter within the jurisdiction of a department or agency of the United States" need not even be used, as long as such facts did appear. And in *Bost v. United States,* 103 F. (2d) 717, 720 (C. C. A. 9, 1939) this Court held as "wholly lacking in merit" a contention that an indictment under Section 80 was bad for failure to allege that the gold which was reported had to be reported on the particular form of affi-

davit on which the indictment was based. This is similar to appellant's contention the indictment should charge that the forms here used were necessary.

Since the decision in *Hagner v. United States,* 285 U. S. 427, 431-434 (1932), federal courts have determined the sufficiency of criminal pleadings on the basis of practical as opposed to technical considerations. In that case, in construing an indictment under the mail fraud statute, the Court said (285 U. S. 431):

> "The rigor of old common law rules of criminal pleading has yielded, in modern practice, to the general principle that formal defects, not prejudicial, will be disregarded. The true test of the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, 'and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.' *Cochran and Sayre v. United States,* 157 U. S. 286, 290; *Rosen v. United States,* 161 U. S. 29, 34."

These general principles have been embodied in the various suggested forms of indictments in the Appendix of the Rules of Criminal Procedure (cf. Form 6, Indictment for Interstate Transportation of Stolen Motor Vehicles). And Rule 7(c) states that the indictment "shall be a plain, concise and definite written statement of the essential facts constituting the offense charged."

Based on these tests, the indictment in this case is clearly sufficient.

IV.

The Court Was Correct in Its Rulings on Evidence.

Appellants also object: (1) to the refusal of the court to permit them to ask a Government witness: "You know now that you did commit a felony at that time?" (A. B. 26-27); (2) to the admission over appellants' objection of evidence of the Lauridsen transaction to show intent (A. B. 27-35); and (3) to the cross-examination of appellant Todorow concerning the dealer's license number appearing on his application for priorities (A. B. 35-40).

(1) Exclusion of Felony Question.

The court properly refused to allow appellants to ask Taylor, a Government witness, "You know now that you did commit a felony at that time?" This question is argumentative, and calls for the conclusion of the witness. It relates to the signing by Taylor of the Veteran's Application for Surplus Property containing the false statements. Counsel had previously been permitted to ask the witness if he had read the certification on the Application before he signed it, and if he knew that he was signing a false document [R. 203]. Counsel was also permitted to ask Taylor if he had been prosecuted for such offense, and if he hoped not to be [R. 204]. A reading of these pages of the record in their entirety [R. 203-204] shows quite clearly this was not a case where "the Court chopped off defense counsel in his questioning of Taylor, the principal witness in the case in this transaction on the fundamental issue of guilt or innocence involved in it." (A. B. 26.) Taylor's knowledge of the quality of his acts, and of his hope of immunity, were explored, and the question stricken was a patently objectionable question in a series covering the same matter.

Appellants also contend that the court's statement, "You do not need to answer that. Put another question," in ruling on the Government's objection, "put defense counsel in a bad light before the jury" (A. B. 26). The mere statement of this objection in its own answer. Cf. *Simon v. United States,* 123 F. (2d) 80, 83 (C. C. A. 4, 1941), cert. den. 314 U. S. 694.

(2) Evidence of Other Acts.

Appellants object at length to the admission of evidence of the Lauridsen transaction, as bearing on appellants' intent. Lauridsen, a veteran employed as a parking attendant at appellants' hotel [R. 191], went with appellants and Taylor on their trip from Los Angeles to Port Hueneme and back for the same purpose as Taylor. He made out an application and was certified for six oil trucks, and turned his papers over to appellants, and was paid $15 by them [R. 176-183, 185-186, 191, 193-195, 157-160, 230, 292]. 292].

The general rule is that evidence of other acts or crimes of a defendant are not admissible in evidence, because they are both too remote and too prejudicial. There are, however, important exceptions permitting evidence of such acts to show intent, purpose, design, or knowledge. *Williamson v. United States,* 207 U. S. 425, 450-451 (1908); *Jones v. United States,* 258 U. S. 40, 48 (1922); *Paine v. United States,* 7 F. (2d) 263, 264-265 (C. C. A. 9, 1925); *Heskett v. United States,* 58 F. (2d) 897, 900 (C. C. A. 9, 1932), cert. den. 287 U. S. 643; *United Cigar Whelan Stores Corp. v. United States,* 113 F. (2d) 340, 346-347 (C. C. A. 9th, 1940); *Tedesco v. United States,* 118 F. (2d) 737, 739-741 (C. C. A. 9, 1941); *Henderson v. United States,* 143 F. (2d) 681, 683 (C. C. A. 1944).

Mr. Justice Story stated the rationale of the rule in *Wood v. United States,* 41 U. S. (16 Pet.) 342, 360 (1842):

> "The question was one of fraudulent intent or not; and upon questions of that sort, where the intent of the party is matter in issue, it has always been deemed allowable, as well in criminal as in civil cases, to introduce evidence of other acts and doings of the party, of a kindred character, in order to illustrate or establish his intent or motive in the particular act directly in judgment. Indeed, in no other way would it be practicable, in many cases, to establish such intent or motive, for the single act, taken by itself, may not be decisive either way; but when taken in connection with others of the like character and nature, the intent and motive may be demonstrated almost with a conclusive certainty."

And this rule is of course applied in cases under Section 80 of Title 18. *Roberts v. United States,* 137 F. (2d) 412, 415 (C. C. A. 4, 1943), cert. den. 320 U. S. 768; *United States v. Uram,* 148 F. (2d) 187, 189 (C. C. A. 2, 1945).

There is also a well settled exception permitting the admission of such evidence to show plan, scheme or design. *Henderson v. United States,* 143 F. (2d) 681, 683 (C. C. A. 9, 1944); *Schwartz v. United States,* 160 F. (2d) 718, 721 (C. C. A. 9, 1947); *Tomlinson v. United States,* 93 F. (2d) 652, 654 (App. D. C. 1937), cert. den. 303 U. S. 646, 642.

In the *Henderson* case, this Court sustained the admission of evidence of illegal transfers of gasoline coupons,

in addition to those charged in the indictment, as showing the indicted transfers were part of an unlawful plan, scheme, or design.

Such evidence is also admissible where it is so commingled with the crime as to form one transaction, and proof of one involves proof of the other. *Johnston v. United States,* 22 F. (2d) 1, 5 (C. C. A. 9, 1927), cert. den. 276 U. S. 637; *Schwartz v. United States,* 160 F. (2d) 718, 721 (C. C. A. 9, 1947).

In admitting the Lauridsen evidence, the Court repeatedly cautioned the jury as to its limited purpose, stating that the jury could not consider it as evidence tending to prove any transaction in the indictment, but that if the jury should find that the transactions charged in the indictment had occurred, then they could consider the Lauridsen evidence on the question of the intent with which the acts charged in the indictment were done [R. 160, 166, 186, 192]. The Court was prepared to repeat the same instruction in its charge to the jury, but omitted it at the express request of appellants [R. 389-391].

(3) Todorow's Dealers License.

Appellants also object to the permitting of cross-examination of appellant Todorow concerning a dealer's license number on his Veteran's Application for Surplus Property (A. B. 35-40).

Todorow had testified on direct examination that he had been given certain forms to fill out by the certification of-

ficer at Port Hueneme, and that he had filled them out [R. 267], and further that the certification officers had not told or instructed him how to fill out the forms [R. 297]. On cross-examination, the Court permitted the Government to examine Todorow concerning the phrase "Dealer License 11-135" which was on the Todorow Veteran's Application for Surplus Property [Gov. Ex. 2, R. 371]. The certification officer had stated that he had asked appellants if they wanted the cars for resale, if they were *bona fide* auto dealers, and what their license numbers were, and had written the numbers they told him on the forms [R. 150-153]. It would thus appear that the matter of the forms was opened up by appellant on direct, and could be gone into on cross-examination.

Even if this Court should feel that the matter was not opened on direct, it was a proper subject of cross-examination. A defendant taking the stand is like any other witness, and can be examined for the purpose of impeaching his testimony. *Reagan v. U. S.*, 157 U. S. 301, 305 (1895); *Raffel v. U. S.*, 271 U. S. 494, 497 (1926).

Impeaching questions that go to conduct reflecting upon a defendant's integrity or veracity are proper. *Coulston v. U. S.*, 51 F. (2d) 178, 181-2 (C. C. A. 10, 1931]; *Banning v. U. S.*, 130 F. (2d) 330, 337 (C. C. A. 6, 1942), cert. den. 317 U. S. 695. Various types of impeaching questions, far less directly connected with the issues than those here, have been permitted by the courts. *Simon v. U. S.*, 123 F. (2d) 80, 85 (C. C. A. 4, 1941), cert. den. 314 U. S. 694 (if made false statement in visa

application and income tax return); *United States v. Rubenstein,* 151 F. (2d) 915, 919 (C. C. A. 2, 1945), cert. den. 326 U. S. 766 (if defendant ever disbarred or suspended) ;*United States v. Waldon,* 114 F. (2d) 982, 984 (C. C. A. 7, 1940), cert. den. 312 U. S. 681 (if defendant used alias); *Viereck v. U. S.,* 139 F. (2d) 847, 851-2 (Dist. of Col. 1944), cert. den. 321 U. S. 794 (if defendant claimed privilege against self-incrimination when subpoenaed as witness concerning same matters); *United States v. Frankel,* 65 F. (2d) 285, 288 (C. C. A. 2, 1933), cert. den. 290 U. S. 682 (if had failed in business, and had changed name of company because of finance company trouble); *United States v. Buckner,* 108 F. (2d) 921, 927 (C. C. A. 2, 1940), cert. den. 309 U. S. 669 (circumstances surrounding resignation from Bar). It is apparent that the Court has wide discretion in cross-examination, and such discretion was not abused in this case.

Further, appellant Todorow, when asked the disputed questions, disclaimed any knowledge of the license number or how it got on his application [R. 302-305]. In view of the answers of Todorow, it is difficult to see any prejudice, even if asking the question were improper. Rule 52(a) of the Rules of Criminal Procedure provides that "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." See also 28 U. S. C. 391. *Cf., United States v. Frankel,* 65 F. (2d) 285, 288 (C. C. A. 2, 1933), cert. den. 290 U. S. 682. No prejudice has been shown here.

V.

The Trial Was Conducted Fairly.

Appellants pick out various incidents during the trial, and allege that they indicate a deprivation of a fair trial and the denial of the assistance of counsel. A reading of the entire record shows that appellants were given a fair trial, and that counsel had adequate opportunity to properly represent them.

(1) Remanding of Appellants to Custody and Speed of Trial.

Appellants contend that the remanding of appellants to custody on the first day of the trial, and the speed of the trial, deprived them of a fair trial and adequate representation by counsel (A. B. 41-43, 44-45, 50-52).

Appellants were indicted on November 20, 1946 [R. 6]. They were arrested in New York State and posted bond on November 21, 1946 [R. 88]. Appellant Todorow resisted removal, but removal was finally ordered, and arraignment and plea set for March 17, 1947, in Los Angeles [R. 88]. At the request of appellants, arraignment and plea were deferred to the date of trial in order to save appellants and their counsel a lengthy trip [R. 88-89]. Arraignment, plea, and trial, were, on March 13, 1947, set for April 22, 1947, and appellants promptly so notified [R. 89]. On April 21, 1947, present counsel for appellants asked for a continuance until the 24th on the grounds that he had just been retained as counsel and did not know the facts and that he was not sure appellants could be there in time because of bad flying weather. This request was denied [R. 48-53]. New York counsel for appellants had been previously informed that the Government would not consent to any continuance [R. 49]. On the arraignment, plea, and trial date, April 22, only one

appellant, Potolski, appeared, and an affidavit was presented as to Todorow's illness [R. 54-57]. Because the Government did not wish to try the two separately, the case was continued until April 24. On April 24, both appellants were present, and the trial began [R. 68]. On the first day of trial, the Court ordered appellants committed and their bonds exonerated [R. 98]. Appellant Potolski had not even left New York on the 22nd, the day set for trial [R. 83].

The Court had the right to commit appellants once trial had begun. *United States v. Rice,* 192 Fed. 720 (C. C., S. D. N. Y., 1911). In view of the obvious efforts of appellants to put off the trial, and the lateness of Potolski in appearing, the Court acted within its discretion.

Even if the commitment was improper, it does not affect the propriety of the trial. Counsel makes much of the inconvenience appellants' commitment caused him. Many a defendant who cannot raise bail is similarly tried.

And the speed of which appellants complain is not apparent from the record.[5] The Court sat only the customary hours, and while it sat on Saturday to make up for the postponement from Tuesday to Thursday, there was no trial on the following Sunday or Monday.

Appellants had six months to prepare for trial. Even when they hired new counsel at the last minute, he was hired on a Saturday [R. 90], and the trial did not begin until the following Thursday. And, as pointed out above,

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[5]Trial consumed the following time:
Thursday, April 24—10:00-11:56, 1:45-4:25 [R. 10-15].
Friday, April 25—10:00-12:00, 1:45-4:30 [R. 15-17].
Saturday, April 26—10:00-12:25, 1:55-3:30 [R. 17-18].
Tuesday, April 29—10:00-12:15, 1:30-4:00 [R. 19-20].
Wednesday, April 30—9:30-12:00, 1:30-5:30 [R. 30-31].
Thursday, May 1—9:30-10:30 [R. 32].

there was a two-day break in the middle of the trial, before the Government had finished its case, which gave further opportunity for consultation. It is true that appellant Potolski claimed to be suffering from a stomach ulcer [R. 136], but he was able to fly out from New York, participate in the trial fully and take the stand, and looked dapper in court [R. 138]. In view of all these facts, and the fact that arraignment and plea was especially deferred to convenience appellants, there is no substance to the claim that they were denied counsel, and the Court's treatment of them was improper.

Appellants also quote various excerpts from the arguments over the commission of defendants (A. B. 44-45). Counsel contended that appellants should be released again on bail, because conditions in the county jail were bad [R. 133]. The Court permitted appellants' counsel to make a showing [R. 135], and when counsel suggested this be done by affidavits of appellants, the Court said it preferred appellants' testimony, since appellants were present in Court [R. 136]. This is cited as evidence of prejudice (A. B. 45). A preference of the Court for the best evidence is strange proof of prejudice. A description of appellants' appearance, made in the course of this showing, is also cited by appellants as prejudicial (A. B. 45). All this occurred out of the presence of the jury [R. 16]. Since the rules do not permit photographs in Court (Rule 53 of Rules of Criminal Procedure) a description in the record was the only way to show how appellants did look.

(2) Examination of Curtis Alexander (A. B. 43-44).

Appellants object to the remarks of the Court on two occasions during cross-examination of Curtis Alexander. The first remarks [R. 123, A. B. 43) embody the refusal of the Court to permit the question (which does not ap-

pear in the excerpt quoted in Appellants' Brief): "Didn't I understand you to say that?" This obviously unanswerable question is so clearly improper it is difficult to see how a refusal of the Court to permit it is prejudice.

The second excerpt [R. 126, A. B. 44] dealt with a refusal by the Court to permit appellants' counsel to continue a question beginning, "You testified on direct examination . . ." This was the beginning of a statement of the evidence by counsel, which was also obviously improper, and which the Court rightly cut off.

(3) Location of Counsel (A. B. 45, 46).

Appellants quote as indicating prejudice an excerpt in which the Court sent counsel for appellants to their seats after Government counsel protested that it was disconcerting to have both counsel up by the witness [R. 180, A. B. 45]. Appellants quote only the first sentence of the Court's remarks. The complete statement of the Court is [R. 180]:

> "The Court: Yes, Mr. Lavine and Mr. Baughn [counsel for appellants], you will both take your seats. And you, Mr. Harrington [counsel for Government], will please stand at the lectern."

Appellants also object to the Court making them stand at the lectern to question witnesses [R. 291, A. B. 46]. As this Court knows, this is a common requirement of many judges in the conduct of their Court, and lies in the discretion of the Court. As the excerpt quoted just above indicates, the requirement was imposed on Government counsel, as well as on appellants' counsel.

(4) Cross-Examination of Taylor (A. B. 45-46, 47-48).

Appellant states that the Court's remarks in connection with four rulings as to Taylor's testimony indicate prejudice. The first ruling, on the question, "You know now

that you did commit a felony at that time," is discussed at length in Part IV, subsection (1) of this brief.

The second excerpt [R. 205, A. B. 46] deals with the Court's ruling on an argumentative question calling for a conclusion of the witness. It will be noted from the excerpt that counsel twice asked the same improper question, and the Court had twice to repeat its ruling.

The third excerpt [R. 202, A. B. 47] omits the question concerning which the discussion was had. That question was vague, uncertain, and indefinite, and was again repeated by counsel twice in similar form.

The fourth excerpt [R. 203, A. B. 47-48] involves a question improper in form.

It is obvious from these assignments of error that appellants do not like the judge's rulings, but cannot find legal fault with them as such, and hence charge that correct rulings on the law indicate prejudice. It should be noted in this connection that the Court instructed the jury that they were to draw no inference against either side from rulings or admonitions of the Court in connection with rulings on evidence [R. 342].

(5) Questioning of Witnesses by the Court (A. B. 46).

The Court did question witnesses on occasions, specified by appellants in their brief, but study of the record will show that it was in attempts to clarify issues. On the first such occasion cited by appellants, the Court instructed the jury that they should not draw any inference from questioning by the Court, but that they were sole judges of the facts [R. 143-144]. And the jury were so instructed again in the final charge [R. 341]. There is clearly no prejudice or denial of a fair trial shown here.

(6) The Sentence (A. B. 50).

Appellants object to the remanding of appellants to custody following conviction. This, of course, occurred after the trial was over and after appellants had been found guilty by the Court. It is a common matter to commit defendants on conviction to await sentence, and it was the policy of the particular Court which heard this case in all felony cases [R. 352]. Appellants hint that the Court was anxious to sentence appellants immediately (A. B. 50). The Court offered to sentence appellants immediately only after appellants requested an early sentence, but suggested that a probation report would permit him to act more intelligently, and that such would require about two weeks [R. 352].

(7) Appellants' Argument (A. B. 47).

Counsel objects to interruption of his argument to the jury by the Court because counsel started with an expression of personal opinion [R. 329; A. B. 47], and to the Court's interruption to prevent counsel's repeated use of the epithet "liar" [R. 329-330; A. B. 47].

Personal opinions of counsel are of course not proper, and the court in its discretion can control the argument to limit such expression. *Cf. United States v. Socony-Vacuum Oil Co.,* 310 U. S. 150, 240-243, and the dissent of Mr. Justice Roberts at pp. 264-267. And the use of epithets falls in the same class.

In addition, counsel had been warned concerning both practices in advance of argument [R. 329, 330].

A consideration of all the examples culled by appellants from the record to indicate denial of a fair trial, shows the contrary to be the fact.

VI.

The Bill of Particulars Was Properly Denied.

On the day to which trial was continued, and on which trial was actually begun, appellants filed a motion for a bill of particulars, asking for the name of the person to whom the forms specified in the indictment were given, and the time, place, and persons present, and the exact language of the forms and of each act specified in the indictment [R. 10]. This motion was properly denied.

The information sought was obviously matters of evidence. Count Four of the indictment specified the date, the veteran, the particular form involved, the false representations contained therein, and the particulars in which they were false. These were ample to permit appellants to prepare their defense. In *Frederick v. United States,* 163 F. (2d) 536, 545-546 (C. C. A. 9, 1947), cert. den. 332 U. S. 775, this Court sustained the denial of a bill of particulars requesting similar information where the information involved contained far less specific details than the indictment in the present case.

Appellants allude to Rule 16, permitting discovery and inspection, but appellants never proceeded under such rule. Rule 16 would not have helped them if they had used it, because the forms involved were not either "obtained from or belonging to the defendant or obtained from others by seizure or by process," as the rule requires.

Further, the demand for the bill was not made until April 24, 1948, six months after indictment. It was made on the day to which trial had been continued at appellants'

request. Such delay in requesting a bill suggests that the information asked could not have been too vital to appellants' defense. Where there is such delay, a denial by the Court on that ground alone is not an abuse of discretion. *Barnard v. United States,* 16 F. (2d) 451, 453 (C. C. A. 9, 1926), cert. den. 274 U. S. 736.

Conclusion.

It is obvious from a consideration of the entire record that appellants were accorded a fair trial, and were adequately represented by counsel. The various actions of the Court and the admonitions given were amply called for by conduct of appellants and their counsel, and were not improper. There were no errors of law in the rulings of the Court and the evidence is sufficient to support the verdict. The conviction should be affirmed.

Respectfully submitted,

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